

BEFORE MICHAEL D. RILEY  
INSURANCE COMMISSIONER  
STATE OF WEST VIRGINIA

John Long,  
  
Claimant

and

Administrative Proceeding No.  
12-AP-WCCFTA-02009

Cecil I. Walker Machinery, Employer; and  
Travelers/Farmington Casualty Co., Private Carrier;

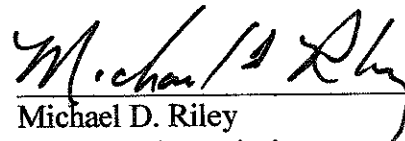
FINAL ORDER

The undersigned, Insurance Commissioner of the State of West Virginia, does hereby adopt and approve the Report to the Insurance Commissioner Upon Petition Alleging Failure to Timely Act of the Office of Judges, appended hereto, as well as the Findings of Fact and Conclusions of Law therein contained. It is consequently **ORDERED** that the TRAVELERS/FARMINGTON CASUALTY CO. on behalf of CECIL I. WALKER MACHINERY be, and are hereby, found to have not committed a violation of the W. Va. Code and/or W.Va. Code of State Rules as referenced in the attached Findings of Fact and Conclusions of Law.

Therefore, this Failure to Timely Act Complaint is DISMISSED from the docket.

Any party aggrieved by this Order may appeal pursuant to West Virginia Code §33-2-14.

Entered this 28<sup>th</sup> day of January, 2013.

  
\_\_\_\_\_  
Michael D. Riley  
Insurance Commissioner  
State of West Virginia

**STATE OF WEST VIRGINIA**  
**WORKERS' COMPENSATION OFFICE OF JUDGES**  
P.O. Box 2233, Charleston, WV 25328 – Telephone (304) 558-0856

IN THE MATTER OF:

John Long,  
Claimant

RE: JCN: 2010136188

And

Travelers/Farmington Casualty Co.,  
Claim Administrator for Cecil I. Walker Machinery, Employer

**REPORT TO INSURANCE COMMISSIONER**  
**UPON PETITION ALLEGING FAILURE TO TIMELY ACT**

**PARTIES:**

Claimant, John Long, *pro se*  
Claim Administrator, Travelers/Farmington Casualty Co., by counsel, Lisa Warner Hunter, Esq.

**JURISDICTION:**

Mr. Long alleges that the employer<sup>1</sup> failed to perform an act required by West Virginia Statute or Rule within time limits set by law. The Office of Judges acquires jurisdiction over the matter pursuant to W. Va. Code §23-4-1c(a)(3) and pursuant to procedure set forth in 93 CSR 1 §§ 18.1 – 18.4.

Specifically, Mr. Long alleges that Travelers/Farmington Casualty Co. failed to timely act upon his requests for temporary total disability benefits and treatment by Dr. Deer.

**RECORD CONSIDERED:**

1. Office of Judges' November 30, 2010, Order (Claim Number 2004018398).

---

<sup>1</sup> Cecil I. Walker Machinery's workers' compensation insurance carrier and claim administrator is Travelers/Farmington Casualty Co.

2. Office of Judges' November 28, 2011, Administrative Law Judge Decision (Claim Number 2004018398).
3. Cecil I. Walker Machinery's December 1, 2011, Appeal and December 13, 2011 Petition to Stay filed with the Board of Review.
4. December 9, 2011, correspondence from David Stuart, Esq. to Lisa Hunter, Esq.
5. Board of Review's December 22, 2011, Order.
6. Travelers/Farmington Casualty Co.'s December 29, 2011, Order.
7. Board of Review's May 1, 2012, Order.
8. Travelers/Farmington Casualty Co.'s May 15, 2012, non-protestable Order.
9. Mr. Long's May 18, 2012, Petition Alleging Failure to Timely Act.
10. Med-Eval's May 29, 2012 and May 31, 2012, Notices of IME.
11. Travelers/Farmington Casualty Co.'s May 31, 2012, Order.
12. Office of Judges' June 15, 2012, Order Acknowledging Petition Alleging Failure to Timely Act and Order to Compel Action and Order to Explain Alleged Failure to Timely Act.
13. Travelers/Farmington Casualty Co.'s July 12, 2012, Response.
14. Transcript of Hearing held August 28, 2012.

#### **FINDINGS OF FACT:**

1. By Administrative Law Judge Decision dated November 28, 2011, in Claim Number 2004018398, the Office of Judges held that John Long, the claimant in the underlying claim, suffered new injuries in the course of and resulting from his employment with Cecil I. Walker Machinery ("Walker Machinery"), on September 29, 2009, resulting in this claim (Claim Number 2010136188), and found Travelers Insurance ("Travelers") to be the chargeable insurer. It should be noted that Farmington Casualty Co. ("Farmington") administers this claim for Travelers.

2. On December 1, 2011, Walker Machinery appealed from the November 28, 2011, Administrative Law Judge Decision, and filed a Petition to Stay on December 13, 2012. By Order dated December 22, 2011, the Board of Review granted a Limited Stay of the November 28, 2011, Decision insofar as it ordered Travelers to reimburse the Insurance Commissioner in its capacity as Administrator of The Old Fund<sup>2</sup> ("Old Fund") for benefits paid as a result of the reopening petition, subject of the November 28, 2011, Administrative Law Judge Decision.

3. In correspondence dated December 9, 2011, David Stuart, counsel for the Old Fund, provided information to Lisa Hunter, counsel for Travelers/Farmington, regarding payments made to Mr. Long as a result of the previous Order of conditional payments, as well as to further benefits that may be payable to Mr. Long, which would then be the responsibility of Travelers/Farmington.

---

<sup>2</sup> By Order dated November 30, 2010 (in claim number 2004018398), the Office of Judges ordered the Old Fund to make conditional payments to Mr. Long.

4. By notice dated December 29, 2011, Travelers/Farmington acknowledged the November 28, 2011, Administrative Law Judge Decision.

5. By Order dated May 1, 2012, the Board of Review modified the November 28, 2011, Administrative Law Judge Decision regarding apportionment of surgery costs between this claim (Claim Number 2010136188) and Claim Number 2004018398. This Order further stated that, if any payments to Mr. Long were required as a result of the Order, such payments should be made within 15 days.

6. By non-protestable Order dated May 15, 2012, Travelers/Farmington acknowledged the May 1, 2012, Order of the Board of Review. This Order further stated that, pursuant to a telephonic conversation, Mr. Long was advised that no medical documentation had been received to support any temporary total disability ("TTD") payments and that, if he obtained the information, Mr. Long should forward it to Travelers/Farmington. Further, this Order advised Mr. Long that Dr. Deer was not in Travelers/Farmington's managed care network, but if an in-network provider could not be found, consideration would be given to covering continued treatment with Dr. Deer.

7. On May 18, 2012, Mr. Long filed a Petition Alleging Failure to Timely Act with the Office of Judges. Mr. Long alleged Travelers/Farmington had failed to timely act on his requests for TTD benefits and treatment with Dr. Deer. Mr. Long did not provide any documentation regarding specific requests for benefits. By Order dated June 15, 2012, the Office of Judges acknowledged Mr. Long's Petition and gave Travelers/Farmington 15 days to rule or take other action as required by law. Further, the parties were given 30 days to offer argument or explanation regarding the allegations.

8. By notices dated May 29, 2012, and May 31, 2012, Mr. Long was advised that he was scheduled for an Independent Medical Evaluation ("IME"), with Dr. Marsha Bailey, M.D. on July 31, 2012.

9. By non-protestable Order dated May 31, 2012, Travelers/Farmington advised Mr. Long that a May 24, 2012, request from Dr. Deer for three follow-up appointments was being withheld pending recommendations from Dr. Schmidt, who performed Mr. Long's surgery, as well as an IME that was scheduled with Dr. Bailey on July 31, 2012.

10. On July 12, 2012, Travelers/Farmington filed its response to Mr. Long's allegations. Travelers/Farmington asserts that Mr. Long did not submit a request for TTD benefits supported by medical evidence; thus, there was no request to act upon. Further, Travelers/Farmington asserts that Mr. Long did not attempt to opt-out of treatment with an in-network provider, or submit a request with supporting medical documentation. For these reasons, Travelers/Farmington asserts that it did not fail to timely act and had complied with West Virginia law in the administration of this claim.

11. A hearing was held before the Office of Judges on August 28, 2012. Mr. Long testified that he verbally requested TTD benefits on April 15, 2012, during a telephonic

conversation with his case worker at Travelers/Farmington, and was told that he would need to provide medical information. Mr. Long asserts that he advised Travelers/Farmington that they already had all of his medical information, which would have been in the form of records from Dr. Deer and Dr. Schmidt. Mr. Long testified that he had not received any TTD benefits for the period after November 2, 2010, and that he believed Travelers/Farmington had all of the necessary medical documentation to justify payment after that date, further advising that he had provided Travelers/Farmington with a signed medical release.

At the hearing, Travelers/Farmington argued that there has been no request for TTD benefits made in this claim, and asserted that the evidence referred to by Mr. Long was submitted to the Office of Judges in prior litigation, and is not sufficient to be considered submitted to the claim administrator with a request for benefits. Ms. Hunter further argued that the claim adjuster responded to the conversation with Mr. Long on May 12, 2012, reiterating that he needed to provide evidence to establish continued disability.

#### **DISCUSSION:**

The provisions of W. Va. Code §23-4-1c(a)(3) provide a venue for a claimant to address situations where a claim administrator fails to timely issue a ruling upon any application or motion as provided by law. The law provides other venues to review substantive disputes regarding the subject matter of rulings, i.e., by filing objections to specific claim administrator's Orders with the Office of Judges pursuant to W. Va. Code §23-5-1 *et seq.* Accordingly, it must be noted that the purpose of this specific report is to determine whether Travelers/Farmington timely acted on a request for TTD benefits and treatment with Dr. Deer. This report is not intended to, nor does it, address the merits of any issues that may be in litigation on Mr. Long's protests to Orders issued by Travelers/Farmington.

In this matter under consideration, Mr. Long seeks a determination that Travelers/Farmington failed to timely act on requests for TTD benefits and treatment with Dr. Deer.

By Decision dated November 28, 2011, in Claim Number 2004018398, the Office of Judges held that Mr. Long suffered a new injury in September 2009, which resulted in the instant claim, and also granted TTD benefits beginning October 3, 2009, and thereafter as substantiated by proper medical evidence (Mr. Long has testified that he received TTD benefits until November 2, 2010). Travelers/Farmington appealed from this Decision and filed a Petition to Stay. The Board of Review granted a limited stay by Order dated December 22, 2011, insofar as the November 28, 2011, Decision ordered Travelers/Farmington to reimburse the Old Fund for benefits paid as a result of the reopening application. This Order further stated that "all other benefits shall not be impacted by this stay." Travelers/Farmington acknowledged the November 28, 2011, Administrative Law Judge Decision by notice dated December 29, 2011, and indicated

that Mr. Long may submit evidence supporting TTD benefits for the period after November 2, 2010. By Order dated May 1, 2012, the Board of Review modified the November 28, 2011, Administrative Law Judge Decision. Travelers/Farmington acknowledged the Board of Review Order on May 15, 2012, and, referencing a telephonic conversation with Mr. Long, advised that it had not received any medical documentation supporting additional TTD benefits and that Mr. Long should provide those once obtained. Further, Mr. Long was advised that Dr. Deer was not an in-network provider. Travelers/Farmington advised that it would assist Mr. Long in finding another doctor but, if one could not be found, it would consider covering continued treatment with Dr. Deer.

With regard to TTD benefits, W. Va. Code § 23-4-1c(b)<sup>3</sup> requires Travelers/Farmington to issue an Order regarding requests for TTD benefits within 15 working days of receipt of either a proper physician's report or any information necessary for a determination. Perhaps due to the existence of this statute, there is no rule found in Series 1 of Title 85 of the Code of State Rules that specifically addresses TTD requests or payments, except with regard to reopening of a claim. Mr. Long testified that he requested payment of TTD benefits during telephonic conversations with two different claims adjusters at Travelers/Farmington, and asserts that Travelers/Farmington was in possession of any medical documentation that would be needed to support his request. Mr. Long further testified that the records he believes support his request for TTD benefits subsequent to November 2, 2010, when he last received benefits, were submitted to the Office of Judges during litigation in Claim Number 2004018398. However, a review of the evidentiary record in that claim does not reveal any medical records were submitted post-dating November 2, 2010, aside from the March 2, 2011, office notes of Dr. Schmidt wherein he advised of the type of surgery that would be performed on Mr. Long's back, as well as the March 21, 2011, operative report. Neither of these documents offers a request for TTD benefits, or a declaration that Mr. Long was temporarily and total disabled for a specific period of time.

Travelers/Farmington argues that it never received any request for TTD benefits from Mr. Long with supporting documentation. While Mr. Long believed that Travelers/Farmington had any documentation it would have needed to make a ruling on his request for benefits, this argument is not sufficient. When Mr. Long verbally requested TTD benefits, he was advised by Travelers/Farmington that documentation supporting his request was required. The statute requires either a physician's report or other information necessary for a determination.

A request for TTD, by its very nature, contemplates an estimated time for the period of disability. Sometimes it involves a definite ending period and sometimes it is estimated. It does not appear that Mr. Long ever provided the medical documentation

---

<sup>3</sup> W. Va. Code § 23-4-1c(b) states, *inter alia*, "The Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, shall enter an order commencing the payment of temporary total disability or medical benefits within fifteen working days of receipt of either the employee's or employer's report of injury, whichever is received sooner, and also upon receipt of either a proper physician's report or any information necessary for a determination. The Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, shall give to the parties immediate notice of any order granting temporary total disability or medical benefits."

as required by W. Va. Code §23-4-1c(b). As such, it cannot be found that Travelers/Farmington failed to timely act. This is not to say that Mr. Long can't provide a doctor's report addressing TTD in the future, only that he has not met the requirements for a valid request at this time.

Mr. Long has also alleged that Travelers/Farmington failed to timely act on requests for treatment with Dr. Deer. The applicable rule regarding requests for treatment is 85 CSR 1 §10.3<sup>4</sup>, which requires Travelers/Farmington to act upon a request for treatment within 15 working days from the date it receives the request. At the time of the filing of his Petition Alleging Failure to Timely Act on May 18, 2012, Mr. Long did not indicate any specific request for treatment. Without an allegation of a failure to timely act with regard to a specific treatment request, it cannot be found Travelers/Farmington failed to timely act in violation of 85 CSR 1 §10.3. The only request for treatment by Dr. Deer referenced in this matter is a May 24, 2012, request addressed by Travelers/Farmington in its May 31, 2012, non-protestable Order wherein it advised that the request for follow-up appointments was being withheld pending recommendations from Dr. Schmidt as well as the results from an IME scheduled with Dr. Bailey on July 31, 2012. It is unclear if this request remains outstanding. If outstanding, Travelers/Farmington should issue a ruling promptly.

It also appears an issue with Dr. Deer's treatment of Mr. Long is that Dr. Deer is not an in-network provider for Travelers/Farmington. Mr. Long was advised of this in Travelers/Farmington's May 15, 2012, Notice, and was further provided with a list of physicians who are in the approved network and advised that continued treatment with Dr. Deer may be considered if treatment with an in-network provider could not be arranged. Travelers/Farmington argues that Mr. Long never notified it of any attempts to treat with an in network provider or to "opt out" of its managed care plan as allowed under 85 CSR 21 §13.

Travelers/Farmington offered to assist Mr. Long in locating a physician in its managed care network and, if one could not be found, it would consider allowing Mr. Long to continue to treat with Dr. Deer. It does not appear that Mr. Long attempted to obtain treatment with an in-network provider, nor does it appear that he attempted to opt-out as permitted by 85 CSR 21 §13, and petitions to continue to treat with Dr. Deer. Therefore, it cannot be found that Travelers/Farmington has failed to take timely action.

#### **CONCLUSION OF LAW:**

Where no valid request for TTD benefits, with supporting documentation, was made, Travelers/Farmington did not fail to timely act in violation of W. Va. Code § 23-4-1c(b).

---

<sup>4</sup> 85 CSR 1 §10.3 states in its entirety, "The responsible party shall act upon an injured worker's request for authorization of medical treatment, medications, appliances, devices and supplies within fifteen (15) working days from the date the request was received by the responsible party."



Where no specific request for treatment was made, Travelers/Farmington did not fail to timely act in violation of 85 CSR 1 §10.3.

Where Mr. Long has not opted out of Travelers/Farmington's managed care plan as permitted by 85 CSR 21 §13, and has not petitioned to continue to treat with Dr. Deer, an out-of network provider, Travelers/Farmington has not failed to timely act.

**REPORT TO THE INSURANCE COMMISSIONER:**

In accordance with the provisions of 93 CSR 1 §18.4, these Findings of Fact and Conclusion of Law are now referred to the Office of the Insurance Commissioner.

Date: October 24, 2012



Alan M. Drescher, Deputy Chief  
Administrative Law Judge

AMD:TDC:dgw

cc: FARMINGTON CASUALTY CO  
JOHN P LONG  
CECIL I. WALKER MACHINERY  
LISA WARNER HUNTER - COUNSEL FOR EMPLOYER  
JEFF BLACK, ESQ.